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INCORPORATING FEDERAL LAW INTO STATE LEGISLATION*

FRED D. FAGG, JR.

While it is, of course, impossible to do more than indicate the trend of the law on some of the most important phases of aeronautical law, there is one other matter of considerable importance that is worthy of careful attention. In an endeavor to avoid the conflicting laws passed in the early history of the railroads we have, perhaps, been a little over-anxious for uniformity. And, certainly, there has not been a scarcity of legislation governing air transportation. Some one hundred and eighty-two bills were enacted into laws this past year. It would seem desirable that we investigate one fundamental matter—that of providing for federal licenses for wholly intrastate flying.

According to the Report of the American Bar Association Committee on Aeronautical Law, some nineteen states provide for federal license for all aircraft and airmen. Relative to this question, the committee report reads as follows:

"The states listed in this report which have adopted laws calling for all aircraft and airmen have not, in the opinion of your committee, premised their legislation on the best legal ground. It is true that the requirement for federal license of all aircraft and airmen would, if adopted by all the states, make for certain uniformity, providing its constitutionality is upheld; but, aside from constitutional questions, it is very evident now that there will always be many of our states disinclined to relinquish all control over intrastate aviation and regulations of the same, so that it can safely be said that if a uniform law is desired it cannot be premised on the absolute requirements of federal licensing of all aircraft and airmen."¹

This matter of constitutionality involves a two-fold problem: first, as to the authority of the federal government to regulate intrastate flying and, second, as to the power of a state to delegate legislative authority. Relative to the former, the argument is that since the federal government is one of limited powers, there is no authority to control intrastate matters. However, in the railroad cases, we have seen that the government is not without authority to regulate

*Portion of a paper read at the First Legislative Air Parley of Midwest States, on the subject, "Air Law as Defined by the Courts," February 25, 1930.

1. Advance Program, American Bar Association, 1929, p. 120.

where intrastate operation constitutes a burden on interstate commerce. As Mr. Walter F. Dodd has said:²

"It is impossible to draw any definite or permanent line between national and state functions. Railroad regulation began with the states and has properly tended to come under national control. The line separating state and national functions must and will shift."

"With the development of interstate commerce by railroad, it has become increasingly necessary that the United States government assume increasing authority over regulation of intrastate carriers. The chief steps in this extension of national authority over railroads may be traced in *Southern Ry. v. U. S.* (1911, 222 U. S. 20), the *Shreveport* case (1914, 234, U. S. 342), and *R. R. Com. of Wisc. v. C. B. & Q. Ry.* (1922, 42 Supp. Ct. 232). Railway transportation is necessarily national in its scope and the 1922 decision by Chief Justice Taft is as necessary a development with respect to that transportation as was the case of the *Genessee Chief* in 1851."

But, even accepting this reasoning, we must not forget that to regulate even private flying is to go beyond the mere regulation of intrastate commerce. It can be justified only on the general theory that, without this regulation, there exists a burden upon interstate commerce.

Relative to the second question, much depends upon what is actually done. That is, has the state merely enacted federal legislation as it exists in the present, or has it endeavored to enact present legislation together with such regulations as are to be added in the future?

Here, it becomes necessary to examine the historical background of our constitutions. They were framed on the theory that the first principle of government required a separation of legislative, executive and judicial powers. Fearing tyranny, the political theories of Montesquieu were accepted by the framers and the courts as the final word of political wisdom. Yet, of course, Montesquieu had in mind a political theory which at that time was nowhere realized in fact. Another suggestion is that as each department of government is itself a delegate, it could not further delegate its authority—or, *delegatus non potest delegare*. Mr. John B. Cheadle suggests³ that the true limitation is that the function attempted to be delegated has been intrusted by the constitution to the legislature, there to be personally exercised, and that the legislature cannot avoid the personal exercise of that function. Yet, he says, three things are generally done: (1) unanimous agreement that legislative powers cannot

2. 32 Yale L. Jour. 452, 455 (1923).

3. 27 Yale L. Jour. 892 (1918).

be delegated by the legislature; (2) the delegation is usually permitted, and (3) there is a growing tendency to give prominence to the supposed "necessity of the case."

The dividing line is well set out by the court in *Cincinnati, etc., Ry. v. Com'rs*,⁴

"The true distinction . . . is between the delegation of a power to *make the law*, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion *as to its execution*, to be exercised under and in pursuance of the law. The first cannot be done: to the latter no valid objection can be made."⁵

Having sketched the general theory, we may start from the positive statement made by Black in his Constitutional Law,⁶ wherein he says:

"There may be no objection to a state statute which simply adopts an existing federal statute and makes it the law of the state, but to provide that the state statute shall automatically conform to any changes thereafter made in the federal law is an attempt to delegate the legislature's power to Congress."

In this connection, our first question concerns itself with the mode of adopting the federal statute. May it be incorporated into the state law merely by reference? The answer would seem to be that, in the absence of constitutional provision to the contrary, such may be done. A case of importance, in point, is that of *Ex parte Burke*,⁷ affirmed in *People v. Frankovitch et al*,⁸ wherein the court, in the former case, said:

"Wherever there is no constitutional provision which forbids it, it is proper to declare that any law of the United States or of another state shall be the law of this state. We find no constitutional provision in this state which forbids such action."

The same is true in Illinois. In *Chicago Motor Club v. Kinney*,⁹ the court said:

"It is permissible to incorporate by reference into a new act provision of other acts which are germane to the subject expressed in the title of the new act, but matters cannot be included in the act by reference which could not have been included directly."

If we consult the Illinois Constitution of 1870, we find in Article IV, Section 13 the following:¹⁰

4. 1 Ohio St. 88, in 11 Va. L. Rev. 183, 192 (1925) Delegation of Power to Legislate, by Cornelius Wickersham.

5. Italics ours.

6. Fourth edition, p. 354.

7. 190 Cal. 326 (1923). See Los Angeles Bar Ass'n. Bulletin, 1929, p. 342-345.

8. 64 Cal. A. 184.

9. 329 Ill. 120, 130 (1928).

10. Cahill's Illinois Revised Statutes, 1929.

" . . . and no law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act . . . "

Does such a constitutional provision defeat such incorporation by reference? Probably not, for the California court in the Burke case¹¹ said:

"That portion of . . . the Constitution which reads as follows, to wit: 'No law shall be revised or amended by reference to its title; but in such case the act revised or amended shall be re-enacted and published at length as revised or amended,' does not prohibit that mode of legislation. It refers only to the revision or amendment of some law already enacted by our state legislature, and has no reference to the enactment of a new provision."

However, there may be a difference when the provision reads as it does in Article II, Section 64 of the Constitution of North Dakota:¹²

"No bill shall be revised or amended, nor the provisions thereof extended or incorporated in any other bill by reference to its title only, but so much thereof as is revised or extended or so incorporated shall be re-enacted and published at length."

While this provision refers to bills, the writer is informed by Judge A. A. Bruce, formerly Chief Justice of the Supreme Court of North Dakota, that it covers the idea of incorporating a statute by reference.

Relative to the question of incorporating the statute so as to include future changes, we have several cases to consider. The general principle is stated in an Illinois case, *The People v. Crossley*,¹³ wherein the court said:

"The effect of such reference is the same as though the statute or the provisions adopted had been incorporated bodily into the adopting statute as it exists at the time of the passage of the adopting act, and does not include subsequent additions or modifications of the statute so taken."

It is interesting to note that the California statute also included by reference further amendments that might be made in the federal act, but the court did not decide whether or not such could be done. It merely stated that if such provision were void, it would not invalidate the whole act.¹⁴

In this connection, we have four other cases to consider, all

11. Ex parte Burke, *supra*, note 7.

12. Compiled Laws of North Dakota.

13. 261 Ill. 78, 85 (1913).

14. Ex parte Burke, *supra*, note 7.

of which deal with legislation relating to the Eighteenth Amendment. They are, *State v. Gauthier*,¹⁵ *State v. Vino Medical Co.*,¹⁶ *In re Opinion of Justices*,¹⁷ and *Commonwealth v. Alderman*.¹⁸ The Massachusetts' opinion is so concisely worded that we shall quote at some length from it.

"1. The purpose of House Bill No. 1612, to which the questions refer, is set forth in its title in these words: 'An Act to carry into effect, so far as the Commonwealth of Massachusetts is concerned, the Eighteenth Amendment to the Constitution of the United States.' One distinguishing characteristic of that bill is that in several sections it incorporates by reference laws made and to be made by the Congress of the United States and regulations made and to be made thereunder for the purpose of establishing offenses to be punished by fine, or imprisonment, or both, by prosecutions to be instituted in the courts of this Commonwealth. See paragraphs 1(b), 3, 6, 34, 37 of the proposed chapter 138. It is attempted by these sections and possibly by other sections to make the substantive law of the Commonwealth in these particulars change automatically so as to conform to new enactments from time to time made by Congress and new regulations issued pursuant to their authority by subsidiary executive or administrative officers of the United States. It purports to create offenses and impose punishments therefor, not by definition and declaration, but by reference to what may hereafter be done in these particulars by the Congress of the United States and those by it authorized to establish regulations.

"We are of opinion that legislation of that nature would be contrary to the Constitution of this Commonwealth. Legislative power is vested exclusively in the General Court except so far as modified by the initiative and referendum amendment. It is a power which cannot be surrendered or delegated or performed by any other agency. The enactment of laws is one of the high prerogatives of a sovereign power. It would be destructive of fundamental conceptions of government through republican institutions for the representatives of the people to abdicate their exclusive privilege and obligation to enact laws. *Boston v. Chelsea*, 212 Mass. 127; *Opinion of the Justices*, 160 Mass. 586. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149."

* * * * *

"2. There is no objection in a constitutional sense to enactment by the General Court of a law embodying in the same words any test, standard, definition or rule prescribed by federal law or adopted under its authority. As already has been stated, no statute would be valid whereby it should be attempted to make operative as a statute of this Commonwealth such test, standard, definition or rule to be enacted or adopted in the future. This is as far as we feel justified in making answer to the second question without a fuller statement of facts to which it is directed."

15. 121 Me. 522 (1922).

16. 121 Me. 438 (1922).

17. 239 Mass. 606 (1921).

18. 275 Pa. 483 (1923).

The fourth case of *Commonwealth v. Alderman*¹⁹ is somewhat different, stating:

"The Act of May 5, 1921, par. 1 (P. L. 407) providing that the 'vinous, spirituous, malt, or brewed liquors,' dealt with in the statute, shall mean all such liquors 'fit for beverage purposes other than such as are from time to time, determined and found to be intoxicating by act of Congress passed pursuant to, and in the enforcement of, the Constitution of the United States,' and that 'intoxicating liquors' shall mean 'anything found and determined, from time to time, to be intoxicating by act of Congress passed pursuant to . . . the Constitution of the United States,' may be viewed as merely designating a definite source of information or standard, and the fact that Congress may change the standard does not invalidate the act on the ground of delegating legislative power."

In the light of these cases, we can well understand why the second section of the Uniform State Air Licensing Act²⁰ is stated to be merely a declaration of policy. If it claims to be more, it would appear to be of doubtful constitutionality. It reads:

"It is hereby declared that the policy, principles and practices established by the United States Air Commerce Act of 1926, and all amendments thereto, are hereby adopted and extended and made applicable, mutatis mutandis, to cover all air traffic in this state, so far as not covered by federal law at any time."

To avoid any difficulty, it would seem desirable to set out the particular statute in full rather than to attempt to incorporate by reference. Further, a state commission should be set up to promulgate rules which would adopt future changes made when the legislature is not in session. This might be done through a declaration of policy such as that now contained in the Uniform State Air Licensing Act, but it would seem that there is a real function for a state commission to perform—granting the complete desirability of uniformity, and for having federal licenses.

The movement for uniformity of state legislation is already strong and has been steadily gaining strength. But, if adoption of formal uniform legislation is insufficient, there is an additional possibility in the matter of interstate compacts.²¹ These compacts between the states, approved by Congress, might offer a real solution to any disputes that might arise between the states relative to flying conditions in the vicinity of state boundary lines.

19. *Commonwealth v. Alderman*, note 18.

20. Advance Program, American Bar Association, 1929, p. 127.

21. 35 Harv. L. Rev. 322 (1922).